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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

and

No. 88-929

JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE AMERICAN ASSOCIATION OF PORT AUTHORITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Association of Port Authorities ("AAPA") respectfully moves to file the annexed brief as Amicus Curiae in support of the Petitioners. Consent to file the brief has been obtained from the attorneys for the Petitioners, Bersani, et al.; Department of Justice, Land and National Resources Divisions and the Solicitor General of the United States. The consent of the attorney for Intervenor-Respondent, Sierra Club, was requested but refused.

As demonstrated more fully in the annexed brief, AAPA supports EPA's goal of protecting wetlands. The policies and programs of AAPA and its individual members recognize the vital role that wetlands play in maintaining the balance of our regional and global ecosystems, and the urgent need to preserve, maintain and enhance this fragile and invaluable natural resource. The objective of AAPA and its individual members is to work cooperatively with and assist the EPA and Army Corps of Engineers in assuring the proper treatment of wetlands while at the same time balancing the need for development to meet the growth requirements of this Nation.

Therefore, AAPA requests leave to file this brief in an effort to bring to the Court's attention the need for reviewing the decision of the Second Circuit which it believes fails to promote a workable scheme that would balance the need to protect wetlands and to accommodate the demands of growth and development.

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By leave of Court, the American Association of Port Authorities ("AAPA") files this brief as Amicus in support of the Petitioners.

I.

INTEREST OF AMICUS CURIAE

The American Association of Port Authorities is an association which represents virtually every United States port agency. The AAPA currently has 84 United States members all of which are public entities mandated by law to serve public purposes, primarily the facilities of waterborne commerce and the consequent generation of local and regional economic growth.

The goal of AAPA and its individual members is to promote the growth and development of our Nation's ports so as to enable this Nation to maintain and enhance its status in trade and commerce among nations. At the same time AAPA recognizes the equal importance of protecting the waters of this Nation, and in particular its wetlands, to preserve and enhance the well being of the environment and its finite natural resources. Therefore, AAPA believes that well-defined substantive standards must be established by the EPA detailing the basis upon which decisions will be made to permit or disallow development in wetlands or areas which may impact upon wetlands. These standards should be developed in a reasoned and just manner by first soliciting input from the members of the regulated community whose individual structures and functions inherently represent a wide range of concerns.

The decision of the Second Circuit has broadened the 'market entry' theory used by EPA in the instant case by stating that it was the only reasonable interpretation of the regulations, *Bersani v. Robichaud*, 850 F.2d, 36, 44 (2d Cir. 1988). Thus, it appears that the Second Circuit is stating that the 'market entry' theory must be used by EPA with respect to all members of the regulated community. Therefore, the decision in this case will have a direct and substantial effect upon AAPA members.

The members of AAPA are public ports and as such have a dual role, acting both in a governmental and proprietary capacity. On the governmental side, ports and their governing boards or commissions are intimately involved with zoning, master planning and related activities. They act as the local sponsors of dredging projects, develop water dependent or related facilities of commerce and promote the development of commerce for those regions which they represent, all pursuant to legislative mandate from the governments which created them. In some instances the governing bodies of ports serve as the local Coastal Commission under the applicable state Coastal Act. In their proprietary capacity, ports engage in strategic planning, marketing, operations and related activities. From both the perspective of ports as governmental and proprietary entities, their involvement in planning for growth is continuous and perpetual, and thus any attempt to apply EPA's 'market entry' theory to them would be an anomaly.

In addition, ports are limited geographically in their sphere of activity to their statutorily defined districts or other legally circumscribed boundaries. Therefore, even the determination of availability of alternative sites on a 'market entry' date would have no meaning under EPA's standardless and geographically amorphous 'market entry' theory. Moreover, since many port authorities have been granted by statute the authority to exercise the power of eminent domain in order to acquire private property within the port district, the decision of the Second Circuit regarding 'market entry' could force EPA to conclude that ports always have alternative sites available, unless the port could show that all other sites within the port district were environmentally more sensitive than the proposed site. This too would be an anomalous result, and a near impossible burden for ports to meet.

II.

STATEMENT OF THE CASE AND INTRODUCTION

AAPA adopts the Statement of the Case in the petition filed by Petitioners, Bersani, *et al.*

Essentially AAPA believes that EPA acted ultra viresly in rendering its decision in the matter *sub judice* insofar as it is intended to set a standardless 'market entry' policy, and that its action was beyond the scope of its authority as defined in Section 404(c) of the Clean Water Act ("CWA") such that it renders the language of that Section meaningless. EPA's action did not amount to a disallowance of a permit as contemplated by Section 404(c), but rather was tantamount to deciding that an entity, in this case Petitioners, was not eligible to apply for a permit in the first instance. EPA concluded that at the time of Petitoners' 'market entry' (a time fixed in retrospect by EPA completely without the benefit of any standards to guide itself, the Army Corps of Engineers ("COE") or the regulated community), there was an alternate site available to Petitioners. Thus, EPA's decision was a threshold determination which could have been decided by the Agency in the first instance without the need for the review of COE's decision to grant the permit as contemplated by Section 404(c). Therefore, whether or not EPA's decision to disallow the permit was factually correct in this particular case, it must not rely generally on Section 404(c) as authority for its action because Section 404(c), by EPA's action in the absence of previously articulated standards, would then be rendered meaningless. Thus, EPA must have acted beyond the scope of its authority, unless it can point to another section of the Clean Water Act which gives it such authority. The discussion in this brief, however, will show that authority for EPA's action cannot be found in the Clean Water Act,

and in fact its action is in contravention of Section 101(a) and (f) of the CWA and EPA's own regulations and guidelines. Therefore, even if EPA's discretionary powers were deemed broad enough to permit its action in this case, it surely could not justify such actions as a general policy.

Most importantly, AAPA believes that the decision by the Second Circuit, insofar as it sanctioned EPA's final determination and broadened its applicability by stating that "a common-sense reading of the statute can lead only to the use of the market entry approach used by EPA," 850 F.2d at 44, constitutes an infringement upon the due process rights of all members of the regulated community who will be deprived of the use of their property, since they were given no opportunity to respond to this broad judicially made rule. Although it is true that EPA had the benefit of a record which included input from the Petitioner for its decision in this controversy, EPA's decision could at best be limited to the facts of this case. However, the Second Circuit has sought to broaden EPA's determination, and by means of the above-quoted language seeks to apply the 'market entry' theory to the entire regulated community which has never had an opportunity to submit any information to assist EPA or the Court in reaching a decision which will profoundly affect their property interests.

Underlying all of this, AAPA believes that the 'market entry' theory as a general policy, devoid as it is of standards, will not serve the purpose of the Clean Water Act with respect to wetlands, since application of it will not foster the goal of wetlands protection.

III.

ARGUMENT

A. THE EPA ACTED BEYOND THE SCOPE OF ITS AUTHORITY UNDER SECTION 404(c) OF THE CWA BY ITS RETROACTIVE APPLICATION OF A 'MARKET ENTRY' THEORY

The Clean Water Act at Section 404(c) grants to EPA the power to disallow the issuance by COE of a permit whenever it determines that an activity would have certain unacceptable adverse environmental effects as specifically enumerated in the Statute. Section 404(c) clearly does not authorize EPA to make a threshold decision that an applicant cannot qualify for a permit due to its 'market entry' date whether or not granting of such would have otherwise unacceptable adverse environmental effects. In the instant case, this is what EPA has done, thus, effectively ignoring the language of Section 404(c) and treating it as if it had no meaning.

The basis upon which EPA decided to apply the 'market entry' theory to the Petitioners, and the means used to determine the point in time when EPA chose to apply it, were unknown to Petitioners and the COE since EPA had apparently not employed the theory in the past to evaluate when the availability of alternative sites would be determined and had set no standards to guide itself, the COE or the regulated community.

It is only too obvious that if such discretionary, retroactive veto powers were contemplated by Section 404(c) there would be no need for the COE and the applicant to go through the administrative process of seeking the permit to begin with since the decision EPA has made could have

been made before any lengthy environmental evaluations and related application procedures were undertaken. The 'market entry' test, requires only that an adverse environmental effect be present, and a determination by EPA that there were practicable alternative sites available on the date of 'market entry', which would then, according to EPA, make the adverse impact unacceptable. Thus, EPA's Section 404(c) veto power would become meaningless and unnecessary under such circumstances since EPA could render its decision in the first instance. The veto power would only be applicable where an applicant had first passed the EPA 'market entry' test since then it would be worthwhile for the applicant to further explore the possible eligibility of its project for a permit. Were this situation known to the applicant and COE in advance, the permit application process would, in many instances, likely not be undertaken. However, in order for the applicant to decide whether it is prudent to apply for the permit, there must be standards established by EPA to give guidance to the regulated community and to the regulatory agencies to ensure that all applicants are fairly treated.

In Section 101(a) of the CWA Congress states that it is a goal of the Statute to restore and maintain the chemical, physical and biological integrity of the Nation's waters; and Section 101(f) states that it is the national policy that procedures utilized for implementing the CWA encourage the drastic minimization of paperwork and interagency decision procedures and best use of available manpower and funds. Clearly the retroactive application of a standardless and previously unannounced 'market entry' test would not be commensurate with either of the goals set forth by Congress in these Sections.

Although an agency is not necessarily precluded from announcing and applying a new standard of conduct by individual, ad hoc litigation which would inherently have

retroactive effect, "such retroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles." *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1581 (1947).

The goals of Section 101(a) would not be fostered by the 'market entry' test because the test would not serve to protect wetlands in the absence of defined standards. The applicant, failing the 'market entry' test on the basis of the availability to it of alternative sites at some time in the past prior to its application for a permit, could, upon the denial of the permit, sell the property to another developer. Assuming that there were in fact no alternative sites available at the time of the sale, the second developer could pass EPA's 'market entry' test and could, in the absence of other unacceptable adverse environmental effects, develop the wetland. Similarly, a developer who at some time in the past purchased wetland property with plans to build upon it in the future, could pass the EPA 'market entry' test as long as there were no practicable alternative sites available at the time of purchase. However, if there were such alternative sites available at the time of the permit application, the 'market entry' test would not protect the wetland. These hypotheticals are not intended to suggest that other determinations by COE and the EPA would not serve to protect the wetland, but are merely illustrative of the point that there is no reason for a standardless, broadly applied 'market entry' test since such would not serve to protect wetlands, and would not foster the goals of the CWA.

Likewise, the time and energy spent by the COE, other state and federal agencies and the applicant in the application process could, in many instances, be avoided if EPA were to openly establish its 'market entry' theory as policy, and were to provide standards for determining when and

how it would be applied. The goals of Section 101(f) of the CWA to streamline procedures for implementing the CWA surely could not be met by the manner in which EPA has applied the 'market entry' theory.

Although it is an established principle of administrative law that reviewing courts will generally give great deference to the interpretation given a statute by the agency charged with its administration, this principle does not apply when "the agency has misinterpreted its statutory mandate." *Association of American Railroads v. Costle*, 562 F.2d 1310, 1318-1319 (DC Cir. 1977).

The EPA has stated in its Guidelines at 40 CFR 230.1(b) that the Guidelines are intended to be "consistent with and to implement" the policies expressed in the CWA. As illustrated, EPA has not fulfilled this objective by interpreting Section 404(c) of the CWA in such manner as to claim authority thereunder to apply a standardless 'market entry' test to the regulated community. Thus, EPA has acted beyond the scope of its authority under the CWA and in contravention of its own Guidelines. The latter fact is even more poignantly demonstrated by an examination of EPA's most current *Wetlands Action Plan* where one of its seven stated objectives reads as follows: "EPA will work with the Corps to reduce uncertainty and confusion regarding implementation of the Section 404 permit program." *Wetlands Action Plan*, Office of Water/Office of Wetlands Protection at 4 (Jan. 1989). EPA has stated in the Plan that one of the actions it will take to meet its objectives is to: "Use Section 404(c) in advance of individual permit applications to protect significant aquatic resources which are identified through the planning processes." *Id.* at 8.

Thus, the above-quoted language and the text of the Plan seem to indicate that EPA too recognizes the need for

guidance and standards in the administration of Section 404(c). Moreover, it is not clear whether EPA in fact did contemplate that a standardless 'market entry' theory was to apply beyond the confines of the present case. In fact with regard to 'market entry' EPA states as follows in its final determination in this case:

> The issue addressed here relates particularly to circumstances where a developer or developers are entering a market area for accomplishment of a specific project. I need not, and do not, decide here what the relevant time period would be in other circumstances – e.g., where an applicant wishes to build on property inherited or acquired long ago.

Final Determination of the Assistant Administrator For External Affairs Concerning The Sweedens Swamp Site In Attleboro Massachusetts Pursuant to Section 404(c) Of the Clean Water Act, (May 13, 1986). See: Petition of *Bersani, et al.* for Writ of Certiorari, Appendix D, p. 93a, n. 14.

Thus, it is not specifically with EPA's determination in the instant case that AAPA takes issue. It is rather with the language by the Second Circuit in *Bersani*, 850 F.2d at 44, which on its face appears to broaden the scope of EPA's standardless 'market entry' theory so as to approve or possibly mandate the application of it to the entire regulated community. In fact the Second Circuit held that there was no reason for EPA to set standards, for to do so would only "confuse things further." 850 F.2d at 45.

The delegation of authority to an agency is not unbounded, and "it is the duty of a reviewing court to determine whether the course followed ... is consistent with its mandate from Congress." *Atchison, Topeka and Santa Fe Railway Company v. Wichita Board of Trade*, 412 U.S.

800, 805-808, 93 S.Ct. 2367, 2374-2375 (1973). An agency must clearly set forth the grounds on which it acted, and it is the "agency's duty to explain its departure from prior norms" so that the reviewing court can understand first what a decision means and then determine whether it was consistent with the statute. *Ibid.*

AAPA believes that EPA should not be permitted such unfettered discretion as the Second Circuit would allow, and in fact that to permit such would result in EPA's acting beyond the scope of its authority under the CWA. It recognizes, however, that EPA may not have intended such a broad interpretation of its final determination regarding the applicability of the 'market entry' theory, and AAPA takes no position with respect to the appropriateness of the theory as restricted to the case at bar.

B. THE SECOND CIRCUIT'S DECISION MAKES EPA'S 'MARKET ENTRY' THEORY APPLICABLE TO ALL MEMBERS OF THE REGULATED COMMUNITY, THUS HAVING THE POTENTIAL TO DEPRIVE THEM OF FIFTH AMENDMENT RIGHTS

As discussed in *Point A*, the decision of the Second Circuit appears to give approval and perhaps even direct EPA to apply, in its discretion, a standardless 'market entry' test to all members of the regulated community who seek to obtain a dredge and fill permit for proposed activities in a wetland. AAPA believes that the Second Circuit, by its engagement in judicial rulemaking, has thus compounded the error of any intention EPA may have had with regard to discretionary application of a standardless 'market entry' theory.

Certainly before EPA could establish such a broadly applicable policy it would have to allow the regulated

community some measure of due process since properties held by many potential permit applicants would be effectively declared undevelopable by such a ruling. Therefore, the ruling should not be made in the quasi-judicial setting.

Generally an administrative agency should not utilize a single case to promulgate a rule of widespread effect. *Marshall v. Western Union Telegraph Company*, 621 F.2d 1246, 1254 (3rd Cir. 1980). The Administrative Procedure Act ("APA") defines a "rule" as "the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy..." *Id.* quoting 5 U.S.C. §551(4) (1976). "When an administrative agency attempts to exercise a legislative function delegated to it by Congress, it must do so in compliance with the provision of the APA, 5 U.S.C. §553" which "requires, *inter alia*, notice of the proposed rule to be published in the Federal Register" and the opportunity for interested persons to comment. *Id.* at 1254. The purpose of the notice and comment requirement was to afford an opportunity for the public to participate in the rulemaking process, and to enable the agency to educate itself before establishing a rule and procedure which would substantially impact the regulated community. *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744 (3rd Cir. 1969). The rulemaking provisions of the APA "were designed to assure fairness and mature consideration of rules of general application," and those provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings." *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759, 766, 89 S.Ct. 1426, 1429 (1969).

Even when an administrative agency engages in an adjudicatory proceeding involving a concrete factual situation, facts and inferences may be used to formulate legislative-type judgments of prospective operation.

Hoffmann-LaRoche, Inc. v. Kleindienst, 478 F.2d 1, 13 (3rd Cir. 1973). In the instance where the adjudicatory proceeding is thus used for legislative purposes, it must follow the notice and comment requirements of the APA, 5 U.S.C. §553(b). *Marshall v. Western Union Telegraph Company*, 621 F.2d at 1254. In the final analysis, "the ultimate standard" against which the court must "evaluate the fairness of the proceedings is due process of law." *Hoffmann-LaRoche*, 478 F.2d at 12, citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S.Ct. 1344 (1968); *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773 (1937).

The Second Circuit, however, without the benefit of any record containing input from the affected parties has, through the mechanism of judicial rulemaking, established the standardless 'market entry' theory as the only reasonable approach for EPA to follow in determining whether or not there are alternative sites available to a proposed project. Therefore, without according to the parties affected by the ruling any due process rights to have their concerns heard, the Second Circuit has set the stage so that many will be deprived of the use of their properties.

A regulatory taking claim in violation of the Fifth Amendment with respect to governmental restrictions on land use requires that a land owner first establish "that the regulation has in substance 'taken' his property — that is, that the regulation 'goes too far.'" *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566 (1986), citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922). Several factors have been identified in an examination of cases to determine whether a regulation has gone too far and these include: "the economic impact of the regulation; its interference with reasonable investment-backed expectations, and the character of the governmental action..." *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390 (1979).

"While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceeding." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 107A S.Ct. 2378, 2386 (1987) (interim ed.) The application of a regulation to a property effects a taking if the regulation does not substantially advance a legitimate governmental interest or if it, "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980). The determination of whether there is a substantial advancement of a legitimate governmental interest requires that the regulation be intended to promote the public welfare. *Id.* at 2142. The mere fact that a governmental regulation was intended to promote a public benefit will not suffice. *Loveladies Harbor, Inc. v. U.S.* 15 Cl. Ct. 381, 387 (1988). The determination of whether a taking has occurred must involve a balancing of the intended public benefit against the harm inflicted upon the landowner. *Agins v. City of Tiburon*, 447 U.S. at 261. When the Federal Circuit Court balanced the governmental interest in preserving certain wetlands against the loss in value to the landowner in *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053, 107 S.Ct. 926 (1987) (interim ed.), it found the balance in favor of the landowner. The finding was based upon the determination that the "Clean Water Act's preservation of wetlands was not for the prevention of a public harm but rather for the maintenance of a public benefit." *Loveladies Habor, Inc. v. U.S.*, *supra*, 15 Cl. Ct. at 388.

The governmental power to interfere by regulations with the general rights of the landowner by restricting the character of his use of the land "is not unlimited," and "such restriction cannot be imposed if it does not bear a

substantial relation to the public health, safety, morals or general welfare." *Nectow v. City of Cambridge, et al.*, 277 U.S. 183, 188, 48 S.Ct. 447, 448 (1928). Thus, where the 'market entry' ruling would not protect wetlands as was demonstrated in *Point A*, it would be subject to challenge under the substantial interest test. In addition to the taking argument, it has been stated that a regulation which goes too far violates the Due Process Clause of the Fifth Amendment. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196, 105 S.Ct. 3108, 3122 (1985).

Moreover, the Second Circuit is not the entity charged by Congress with expertise in matters of wetland protection, and yet it has rendered a decision which will have far ranging impacts without the benefit of input or comments even from concerned federal and state agencies whose opinions would be a necessary requirement to the rendering of a reasoned decision in this matter. As discussed in *Point A*, AAPA believes that the 'market entry' theory, as a rule of general applicability, bears no rational relationship to the protection of wetlands and the furtherance of the goals of the CWA.

The federal courts should not purport to adopt "on their own initiative" drastic new rules that "would make major inroads on a policy matter that Congress has reserved for itself." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 269, 95 S.Ct. 1612, 1627 (1975). The judiciary's rulemaking authority stems from a grant by congressional delegation and this grant is limited by condition that such rules "shall not abridge, enlarge or modify any substantive right." *Marek v. Chesny*, 473 U.S. 1, 34, 105 S.Ct. 3012, 3030 (1985), quoting The Rules Enabling Act, 28 U.S.C. §2072. The test must be whether a rule regulates procedures for the administration of a remedy or operates to abridge a substantive right. *Sibbach v. Wilson & Co.*, 312

U.S. 1, 10, 14, 61 S.Ct. 422, 424, 426 (1941). "While the temptation to engage in judicial rulemaking may be powerful, our Constitution is best preserved by adherence to the proper judicial role." *White House Vigil v. Clark*, 746 F.2d 1518, 1541 (DC Cir. 1984). In a concurring opinion, Justice Fay notes the concern that "judicial rulemaking rarely takes into account the parties expectations, which causes unfairly retroactive rulemaking, and uncertainty in the law." *Georgia Power Company v. Sanders*, 617 F.2d 1112, 1128, n.9 (5th Cir. 1980), *cert. denied* 450 U.S. 936, 101 S.Ct. 1403 (1981).

CONCLUSION

Irrespective of whether EPA intended its standardless 'market entry' theory to apply generally to all members of the regulated community, the decision of the Second Circuit has provided this effect. The decision thus operates as a rule of broad applicability and significant effect. It would not have been proper for EPA to promulgate such a rule in the course of a single quasi-judicial proceeding since such would be beyond the scope of its authority under the CWA, and would not comport with the rulemaking requirements of the APA.

Yet, the Second Circuit, without the benefit of a record including input from the regulated community and the administrative agencies Congress has charged with expertise in wetlands protection, has through judicial rulemaking promulgated the standardless 'market entry' theory as a general rule. Application of this rule has the potential of depriving many members of the regulated community of their property without due process and in contravention of the Fifth Amendment.

In addition, the rule as demonstrated in this brief does not foster wetlands protection, and does not promote a substantial governmental interest. The rule is, therefore, not properly related to the interest sought to be protected. For the foregoing reasons AAPA urges this Court to grant Certiorari to review the decision of the Second Circuit so that a balanced, and reasoned result will be obtained in the area of wetlands protection.

Respectfully submitted,

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